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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1965

No. 1109

EDNA WEED,

Petitioner,

vs.

OWEN BILBREY, SR., GLADYS BILBREY, OWEN BILBREY, JR., PHYLLIS BILBREY, JAMES E. THOMPSON, JR., and PAULA THOMPSON, d/b/a OWEN BILBREY FRUIT COMPANY and JAMES E. THOMPSON, JR., Individually,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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A

OPINIONS BELOW

The petitioner, herein, EDNA WEED, seeks a writ of certiorari to review the judgment and decision of the Supreme Court of Florida in the case of BILBREY vs. WEED, Fla. 1968, *215* So.2d *479*, Case Nos. 36,828, 36,841, which quashed a decision and opinion of the Second District Court of Appeal of Florida in WEED vs. BILBREY, Fla. App. 1967, 201 So.2d 771. Copies of the opinions are appended hereto as Appendix A and Appendix B.

B

GROUNDS UPON WHICH JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Florida Supreme Court was dated and entered July 24, 1968. A timely petition for rehearing was granted, then denied on December 2, 1968. Jurisdiction is invoked pursuant to 28 U.S.C. § 1257 (3); 28 U.S.C. § 2101 (c). The petitioner seeks review, by way of certiorari, of the decision of the Florida Supreme Court, which holds that the absolute defense of contributory negligence—rather than the partial admiralty defense of comparative negligence, applies in an action for wrongful death brought under the Florida Wrongful Death Statute, F. S. 768.01, where the suit is predicated upon a maritime tort committed on navigable waters within the State of Florida. A copy of the Florida Statute is set forth verbation under statutes involved, infra.

The petitioner does not question the right of the Florida legislature to pass a wrongful death act applicable to maritime torts on Florida navigable waters, and the Constitutionality, as such, of the Statute itself is not challenged. Rather, the petitioner contends that such a state statute, as a matter of Constitutional Law, or Federal Law, is and may be remedial only, insofar as application to torts on navigable state waters is concerned; it provides a remedy for wrongful death where none existed before. But once the remedy is created, federally developed *maritime* principles *must be applied*—not state-grounded tort principles.

NOTE: All Emphasis Supplied.
R: Record before Florida Supreme Court.
T: Transcript of trial proceedings contained in Record on Appeal.

In holding to the contrary here, and in holding that, in essence, Florida substantive tort principles applied because the remedy was state created, the Florida Supreme Court in its construction of the statute ran afoul of Article III, Section 2 of the Constitution of the United States, since it applied a substantive principle of law foreign to the federally created admiralty comparative negligence principle. Only this court, of course, may finally determine just what substantive principles apply in any action based upon a maritime tort and these principles must uniformly be applied under Article III, Section 2. The decision below thus set forth a principle which contravened Article III, Section 2. The maritime law can not depend upon location of a fortutious death. For example, one foot or so in one direction or another on a major inland waterway, might give rise to different principles of substantive maritime depending upon how a state chose to apply its death statute—an intolerable admiralty result.

Moreover, the petitioner, Mrs. Weed, through her husband's estate, actually recovered damages for injuries and pain and suffering of her husband prior to his death, under the Florida Survival Statute (F. S. 45.11, as then numbered) under admiralty principles. Obviously, had Mr. Weed lived, admiralty principles would have been applicable; and so also did they apply in the survival case, governed clearly by Mr. Weed's rights. The Florida Death Statute by its terms provides for recovery by the beneficiaries under the statute against ships, vessels, boats, etc., if recovery could have been made "if death had not ensued".

Thus despite the statutory language, beneficiaries under the death statute are victims of unfair discrimination where death ensues, under the ruling of the Florida Court, in violation of Amendment XIV, Section 1 and its due process and equal protection clauses.

Finally, since the law of admiralty enunciated by this Court is the supreme law of the land, the decision below, applying a principle foreign to the admiralty concept of comparative negligence, violates Article VI of the Constitution of the United States. That Article, of course, provides that the Constitution of the United States and laws of the United States made in pursuance thereof, shall be the supreme law of the land.

C

QUESTIONS PRESENTED FOR REVIEW

The primary questions presented are:

I) Does Article III, Section 2 of the Constitution of the United States, or federally developed maritime principles, require uniform application of substantive admiralty principles by the states to actions for wrongful death brought under State Wrongful Death Acts, arising out of maritime torts committed on state navigable waters?

II) Does application of substantive state common law tort principles, foreign to federally enunciated maritime doctrines, by the courts of a stat under such a state statute, unfairly discriminate against statutory beneficiaries in violation of the Fourteenth Amendment?

III) Does application of substantive state common law tort principles, by the Courts of a state under such a State statute, contravene the provision of Article VI of the Constitution of the United States, which renders the Constitution and laws of the United States made in pursuance thereof the supreme law of the land?

D

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

I) Florida Statutes, 768.01 - Right of action for death— (1) Whenever the death of any person in this state shall be caused by the wrongful act, negligence, carelessness or default of any individual or individuals, or by the wrongful act, negligence, carelessness or default of any corporation, or by the wrongful act, negligence, carelessness, or default, of any agent of any corporation, acting in his capacity of agent of such corporation (or by the wrongful act, negligence, carelessness or default of any ship, vessel or boat or persons employed thereon), and the act, negligence, carelessness or default, is such as would, if the death had not ensued, have entitled the party injured thereby to maintain an action (or to proceed in rem against the said ship, vessel or boat, or in personam against the owners thereof, or those having control of her) and to recover damages in respect thereof, then and in every such case the person or persons who, or the corporation (or the ship, vessel or boat), which would have been liable in damages if death had not ensued shall be liable to an action for damages (or if a ship, vessel or boat, to a libel in rem, and her owners or those responsible for her wrongful act, negligence, carelessness or default, to a libel in personam), notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony. (2) The right of action as set forth in subsection (1) above shall extend to and include actions ex contractu and ex delicto.

II) Constitution of the United States, Article III, Section 2;

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States and treaties made, or which shall be made, under their authority . . . . to all cases of admiralty and maritime jurisdiction; . . . .

III) Constitution of the United States, Amendment XIV, Section 1;

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

IV) Constitution of the United States, Article VI;

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding.

E.

STATEMENT OF THE CASE

At approximately 3:15 P.M. on Sunday, September 22, 1963, Wayne Weed was operating his air boat in a northerly direction on the main stream on the Kissimmee River, a navigable body of water (T. 18), in Polk County, Florida. Just as he commenced to turn westward into the Dead River to return to Shell Hammock where his boat ride had originated, another air boat, owned by the defendants, partners, and perated by them through the respondent, James E. Thompson, Jr., came out of the Dead River, a side stream or tributary, proceeding eastward, and a violent collision between the air boats occurred (T. 19-20, 25-28, 82-83, 122-130, 133-138). The left leg of Mr. Weed was severely crushed and after two operations, including an amputation of his left leg, Mr. Weed passed away less than a week after the accident, as a result of his injuries (T. 108-118; 155-166).

Subsequently, his widow, the petitioner, Edna Weed, brought an action as administratrix against the defendants, to recover damages for the pain and suffering of Mr. Weed prior to his death, pursuant to F.S. 45.11, and in a separate action, sued the respondents in Polk County Circuit Court for damages for the wrongful death of her husband, pursuant to F.S. 768.01-02 (R. 1-3). The causes were consolidated for trial (T. 358-359). In the wrongful death action, the defendants (respondents here), interposed the defense of contributory negligence (R. 50-53). The plaintiff moved to strike the defense (R. 60-61) upon the grounds that the underlying accident happened on navigable waters, a maritime tort was involved and, there-

fore, the admiralty doctrine of comparative negligence applied, rather than the complete defense of contributory negligence. After filing of briefs and argument, the trial court entered an order which denied the motion to strike the defense of contributory negligence in the wrongful death case, but at the same time, ruled that comparative negligence was applicable in the survival action (R. 91-92).

Thereafter, at the trial, at the conclusion of the testimony, the respondents argued that the contributory negligence of the plaintiff's deceased barred the wrongful death claim (T. 339, 346-347). The trial court instructed the jury on contributory negligence in the death case, to which the plaintiff objected (T. 365, 373-374, 389). The jury returned a verdict for the plaintiff as administratrix in the survival case in the amount of $21,000, but returned a verdict of not guilty in the wrongful death case (R. 95-99, 224-225). The plaintiff, as widow, filed a motion for a new trial in the death case upon the grounds that the trial court had erred in ruling that contributory negligence was applicable as a complete defense (R. 100). That motion was denied (R. 103). Upon entry of final judgment for the respondents (R. 96-97, 224-225), Mrs. Weed appealed to the Second District Court of Appeal, Florida (R. 226-227).

The negligence of both the respondents and the deceased was submitted to the jury under the court's instructions on negligence and contributory negligence (T. 358, 363-364; 364-365, 374). The record is replete with evidence from which the jury could find that the respondents were negligent in operating their boat at an improper rate of speed while emerging from a side stream to the

left of the Weed boat into the Kissimmee River, at a blind intersection, without maintaining a reasonably careful lookout, and without yielding to the boat on the main stream (T. 82, 123-136, 145-153). On the other hand, there also was evidence that the decedent was operating his air boat at an improper speed and failed to maintain a proper lookout and failed to keep far enough to his right (T. 82-102). In all events, the jury found the respondents guilty of negligence and the decedent guilty of contributory negligence (R. 59; 95-99). Indeed their verdicts show that this was their finding since a verdict was returned in favor of the administratrix based upon the negligence of the respondents, and comparative negligence of the deceased, but the widow, in her wrongful death claim, was denied recovery—patently because the jury found that Mr. Weed was guilty of contributory negligence.

On appeal, petitioner specifically assigned as error the trial court's denial of motion to strike contributory negligence, and the trial court's application and instructions on contributory negligence—as opposed to comparative negligence (R. 228-29) Volume VII.

In an excellently reasoned opinion, the Second District Court of Appeal reversed, 201 So.2d 771, holding that the clear language of the Florida Statute revealed clearly that admiralty principles of law were incorporated into the Statute, including comparative negligence. On the face of the Florida Statute, little fault could be found with the Court's reasoning. The respondents here then took a direct appeal to the Florida Supreme Court, and applied for a Writ of Certiorari in the Florida Supreme Court. The Writ was granted, and the proceedings consolidated.

In the meantime, the United States Court of Appeals for the Fifth Circuit, in diversity of citizenship case No. 24198 pending there, *Moragne et al. v. State Marine Lines, Inc.*, had certified to the Florida Supreme Court, under Florida Procedure, the question as to whether the Florida Death Statute gave rise to an action based on unseaworthiness where a longshoreman had been killed on Florida navigable waters. The Florida Supreme Court answered in the negative on May 29, 1968, Fla. 1968, 211 So.2d 161, rehearing denied July 3, 1968. (Opinion annexed; Appendix C).

Based upon Moragne, the Florida Supreme Court quashed and reversed the decision of the Second District Court of Appeal in *Weed v. Bilbrey*, and again held that State Common Law Principles applied—even on navigable state waters—under the Florida Death Act. The appellant in Moragne, (the widow) has since filed an application in the Court of Appeals *to disregard* the answer of the Florida Supreme Court to the certified question, arguing that the Constitution or federal law requires application of admiralty principles. The *Fifth Circuit* has still not rendered its opinion on the issue.

In any event, on September 24, 1968, the Florida Supreme Court *granted* the petition for rehearing filed by the petitioner in *this* case, and set down oral argument for December 5, 1968. On November 27, 1968, the petitioner sought to amend her original petition, specifically to cite the constitutional principles and federal authorities which would require the Court to apply admiralty principles such as comparative negligence, under the Florida Statute. Constitutional arguments became significant when the Flor-

ida Court disregarded the clear statutory language of F.S. 768.01. Shortly thereafter, the Florida Supreme Court denied rehearing on December 2, 1968, without argument.

F.

REASONS FOR ALLOWING WRIT

The judgment of the Florida Supreme Court contravenes and violates Article 3, Section 2, of the Constitution of the United States and violates Federally developed admiralty principles. It decides an important issue in a manner which in all probability is not in accordance with the law as this court would now pronounce it. It purports to apply Florida Substantive Tort Principles to a Maritime case. It is true that absent the Florida Death Statute, there would be no *remedy* here.

But the petitioner contends that the State of Florida may provide a remedy for wrongful death occurring on navigable waters of the State provided such remedy is in addition to remedies provided under admiralty law and not in conflict therewith. *The Roanoke*, 189 U.S. 185, 23 S.Ct. 491, 47 L.ed 770; *Gillespie v. U. S. Steel Corp.*, (1964) 379 U.S. 148, 85 S.Ct. 308, 13 L.ed 2d 199.

The petitioner vigorously contends that the State of Florida may not apply state common law in determining the rights, obligations or liabilities of the parties in a case involving such a maritime death. Clearly, the tort is maritime in nature whether or not a person is injured or death results. The duties, rights and obligations are

maritime in nature and do not change simply because a death occurs, granted that there may not be a remedy or a right to obtain damages for the death, absent an appropriate State statute. In no event, however, can the Florida courts or legislature constitutionally extend the Florida common law to cover such maritime torts where the common law conflicts with admiralty law.

If the Florida Supreme Court or the Florida Legislature ca constitutionally provide the substantive law applicable to marine deaths, then such state law becomes paramount and takes the place of admiralty substantive law.

The petitioner contends that the State of Florida may not, either by its courts or legislature, provide the system of law which prevails and determine the rights, obligations and liabilities of the parties in a case involving a maritime death, except to the extent that it provides a remedy in addition to other remedies provided by admiralty law for the enforcement of duties founded in admiralty law.

In this case, the Florida Supreme Court has extinguished the doctrine of comparative negligence on navigable Florida waters in death cases.

If Florida can do what is claimed here, is there anything to prohibit the legislature from passing nautical rules of the road, collision rules or other substantive principles which conflict with the traditional and ancient substantive law of admiralty, restricted, of course, to death cases, simply on the principle that where Florida furnishes the remedy it may also provide the substantive law?

PRESENT STATUS OF TUNGUS

Appellant also wishes to again call the Court's attention to the questionable present status of the rule announced in *M/V Tungus v. Skovgaard*, (1959) 358 U.S. 588, 79 S.Ct. 503, 3 L.ed. 2d 524. In *Tungus*, Chief Justice Warren and Justices Black, Douglas and Brennan, felt that admiralty law must be applied uniformly and the State wrongful death statutes must be restricted to furnishing a remedy for wrongful death and that the States had no right to furnish the substantive law to go with the remedy, in conflict with admiralty law.

In *Goett v. Union Carbide Corporation*, (1960) 361 U.S. 340, 80 S.Ct. 357, 4 L.ed. 2d 341, and *Hess v. United States*, (1960) 361 U.S. 314, 80 S.Ct. 341, 4 L.ed. 2d 305, Justice Whitaker explained his position in *The Tungus* and in doing so apparently receded from the position of the majority therein:

> "I am persuaded that the Court of Appeals has made sufficiently clear that it thought this diversity, admiralty, death case was governed by the general maritime law, as remedially supplemented by the West Virginia Wrongful Death statute, and properly decided it on that basis.
>
> The Court's opinion says that The Tungus v. Skovgaard, 358 U.S. 588, 79 S.Ct. 503, 3 L.ed. 2d 524, 'decided that it was a question of state law as to what is the proper substantive law to be applied to maritime torts within the territorial jurisdiction of the States in wrongful death cases [and that] [u]nder this holding, in a

maritime tort death case, the State might apply the substantive law generally applicable to wrongful death cases within its territory, or it might choose to incorporate the general maritime law's concepts of unseaworthiness or negligence.' I do not understand the Tungus case to so hold, and if such a holding was intended by its author or by any of the Justices who joined it, it does not say so.

* * *

Although state Wrongful Death statutes are not ones of survivorship and are generally spoken of as creating a new cause of action for death, it seems rather clear that the West Virginia Wrongful Death statute, like most others, creates a cause of action only in the sense of providing a remedy for death resulting from an act made wrongful by other laws — whether common, statutory or maritime laws — which would have redressed the wrong 'if death had not ensued.' W. Va. Code, 1955, §5474(5). And when, in a case encompassed by the terms of the State's Wrongful Death statute, admiralty 'adopts' such statute, it does so only to afford a remedy for a substantive cause of action created by the maritime law which, 'if death had not ensued,' would have redressed it." (p. 345-346)

In *Hess v. U. S.*, supra, Justices Harlan and Frankfurter receded from their position in *The Tungus*, supra:

> "The Court, if I read its opinion right, holds that when a victim of a maritime tort dies as a result of such conduct, the law of the State whose wrongful death statute is invoked wholly governs liability. At the same time the Court leaves open the question whether a state wrongful death act might contain 'provisions so offensive to traditional principles of maritime law that the admiralty would decline to enforce them,' finding that this Oregon statute 'presents no such problem.'
>
> I cannot agree with the view that wrongful death actions growing out of maritime torts are so pervasively controlled by state law, or with the conclusion that this state statute in its substantive provisions is, in any event, not offensive to maritime law." (p. 322-323)

In *Goett v. Union Carbide Corporation*, supra, the Chief Justice and Justices Black, Douglas and Brennan, noted that they joined with Justice Clark in this per curiam opinion solely under compulsion of *The Tungus* and noted their continuing disagreement with the ruling in *Tungus*. In the *Hess* case, the Chief Justice and Justices Black, Douglas and Brennan likewise joined with Justice Stewart in the majority opinion and noted their continuing disagreement with the decision in *Tungus*.

Petitioner, therefore, urges that the majority in *Tungus* has been so dissipated in subsequent decisions that it can no longer serve (if, in fact, it ever did) as controlling authority for the proposition that the States have the paramount right to provide substantive law applicable under their respective wrongful death statutes.

It is apparent that there is present confusion regarding the meaning and thrust of the Supreme Court's decision in the *M/V Tungus v. Skovgaard*, supra.

It seems clear, however, that the power of the States is constitutionally limited by Article 3, Section 2 of the United States Constitution and, or federally created maritime principles. The States may:

1. Provide a remedy for the enforcement of admiralty principles where: (a) no such remedy exists in admiralty law, or (b) the State remedy is in addition to and not in conflict with existing admiralty remedies;

2. The States may not provide a remedy in conflict with existing admiralty remedies; and

3. The States may not provide substantive law in the maritime field since only the Congress and the federal courts have jurisdiction to provide such substantive law.

Here, Florida has clearly provided a remedy for wrongful death where none exists in admiralty law. The remedy itself, that is, the right to recover damages for wrongful death on navigable waters does not conflict with existing admiralty remedies.

Florida has attempted to go further and to substitute Florida substantive law for existing admiralty substantive law, fixing the rights, obligations and liabilities of the parties arising from death occurring on navigable waters.

This, Florida may not constitutionally or lawfully do. Uniformity of maritime law forbids it.

In *Knickerbocker Ice Co. v. Stewart*, (1920) 253 U.S. 149, 40 S. Ct. 438, 64 L. ed 834, the United States Supreme Court declared unconstitutional an attempt by the Congress to extend the operation of State workmen's compensation statutes to injuries and death occurring on navigable waters within the territorial limits of the States and said:

> "The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. Morover, it took from the states all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations. To preserve adequate harmony and appropriate uniform rule relating to maritime matters and bring them within control of the federal government was the fundamental purpose; and to such definite end Congress was empowered to legislate within that sphere.
>
> Since the beginning federal courts have recognized and applied the rules and principles of maritime law as something distinct from laws of the several states — not derived from or dependent on their will. The foundation of the right to do this, the purpose for which it was granted, and the nature of the system so administered, were distinctly pointed out long ago:

'That we have a maritime law of our own, operative throughout the United States, cannot be doubted. * * * One thing, however is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states which each other or with foreign states.' *The Lottawanna*, 21 Wall. 558, 574, 575 (22 L. Ed. 654). (p. 160-161)

* * *

Obviously, if every state may freely declare the rights and liabilities incident to maritime employment, there will at once arise the confusion and uncertainty which framers of the Constitution both foresaw and undertook to prevent." (p. 166)

The decision in *Knickerbocker Ice Co. v. Stewart*, supra, followed the Supreme Court decision in *Southern Pacific Company v. Jensen* (1917), 244 U.S. 205, 37 S. Ct. 524, 61 L. ed 1086, holding that the New York Workmen's Compensation Statute could not be validly or constitutionally applied to compensate for the death of a longshoreman killed on navigable waters in the State of New York. Subsequent to *Knickerbocker Ice Co. v. Stewart*, supra,

the Congress again attempted to extend the State workmen's compensation laws to cover injuries or death of maritime workers occurring on navigable waters within the territorial limits of the States, but excluding masters and members of the crew of vessels. Again the Supreme Court, following *Knickerbocker Ice Co. v. Stewart*, supra, declared unconstitutional this Congressional enactment. *Washington v. W. C. Dawson & Co.* (1924) 264 U.S. 219, 44 S. Ct. 302, 68 L. ed 646.

In *Red Cross Line v Atlantic Fruit Company*, (1924) 264 U.S. 109, 44 S. Ct. 274, 68 L. ed 582, the Supreme Court held that the State of New York had the authority to confer a remedy for the enforcement of arbitration contained in a maritime contract and distinguished between remedies, which States have the right to furnish, from the substantive law which the States do not have the authority to tamper with.

In this case the Supreme Court said:

> "The 'right of a common law remedy,' so saved to suitors, does not, as has been held in cases which presently will be mentioned, include attempted changes by the states in the substantive admiralty law, but it does include all means other than proceedings in admiralty which may be employed to enforce the right or to redress the injury involved. It includes remedies in pais, as well as proceedings in court; judicial remedies conferred by statute, as well as those existing at the common law; remedies in equity, as well as those enforceable in a court of law. (p. 123-124)

* * *

> This state statute is wholly unlike those which have recently been held invalid by this court. The Arbitration Law deals merely with the remedy in the state courts in respect of obligations voluntarily and lawfully incurred. It does not attempt to either modify the substantive maritime law or to deal with the remedy in courts of admiralty." (p. 124).

Nor does the Fourteenth Amendment permit such an unreasonable and unfair classification as that created by the decision of the Florida Court here. The estate beneficiaries may recover under admiralty principles of comparative negligence (for pain and suffering prior to death) under the survival statute—but not the beneficiaries under the death statute; see *Levy v. Louisana*, ... U.S. ....., 88 S. Ct. 1509; *Glona v. American Guarantee and Liability Insurance Company*, ... U.S. ....., 88 S. Ct. 1515 (state, even in creating remedy by death statute where none existed before, cannot discriminate unfairly).

And of course, Mr. Weed could have recovered under comparative negligence had he lived—See, *Pope and Talbot, Inc. v. Hawn*, 346 U. S. 406, 74 S. Ct. 202; *Judy v. Belk*, Fla. App. 1966, 181 So. 2d 694—but beneficiaries can't under the death statute. This is simply unfair and unreasonable.

Finally, Article 6 makes the federal maritime substantive law supreme here, not the law as pronounced by the Florida Supreme Court.

Uniformity of maritime law requires reversal.

CONCLUSION

The Petition for a Writ of Certiorari should be granted, and the Florida Supreme Court judgment reversed, and the cause remanded to trial court for a new trial.

Respectfully submitted,

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By_____
WILLIAM WAGNER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for a Writ of Certiorari to the Supreme Court of Florida was mailed to Fowler, White, Gillen, Humkey and Trenam, Attorneys for Respondents, P.O. Box 1438, Tampa, Florida, this 27th day of February, 1969, and to the Clerk of the Supreme Court of Florida.

By_____
WILLIAM WAGNER

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APPENDIX "A"

(TITLE OMITTED)

Opinion filed July 24, 1968.

Writ of Certiorari and Appeal to the District Court of Appeal, Second District.

John W. Boult and Fowler, White, Collins, Gillen, Humkey & Trenam, for Petitioners-Appellants.

Robert Orseck, Podhurst & Orseck; Wagner, Cunningham & Vaughan; and Peter G. Kalogridis, for Respondent - Appellee.

PER CURIAM.

Petition for writ of certiorari has been granted in this cause to review a decision of the District Court of Appeal, Second District,[1] which reversed a judgment for defendant, the petitioner Bilbrey, in an action for wrongful death under Sec. 768.01, .02, F.S. A companion appeal presenting the same substantive issues in this Court has been consolidated for disposition with this proceeding.

The appellate court held that defendants were not entitled to assert contributory negligence as a bar to recovery, because the Florida act "preserves all rights which the decedent would have had if his injuries had not proved fatal" and required application of the comparative negligence rule which would have been available to decedent in an admiralty action. Certiorari was granted on the ground of conflict with opinions stating that the Florida act creates an entirely new cause of action, in an

[1]Weed v. Bilbrey, Fla.App. 1967, 201 So.2d 771.

entirely new right, for the recovery of damages suffered by the beneficiaries, not the decedent.[2]

We believe the recent decision and opinion of this Court in Moragne et al. v. State Marine Lines, Inc.,[3] require that the appellate decision in the present case be quashed.[4] Rejection of the maritime rule of liability for unseaworthiness in an action for wrongful death, upon the reasoning detailed in the Moragne opinion, is impossible to reconcile with application of the maritime rule of comparative negligence in the present case.

The decision of the appellate court in this case is accordingly quashed and the cause remanded with directions that the trial court be affirmed.

CALDWELL, C. J., ROBERTS, DREW and THORNAL, J J., concur.

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[2]F.E.C.Ry. Co. v. McRoberts, Fla. 1933, 149 So. 631, 633:

". . . [T]he Florida Death By Wrongful Act Statutes, do not purport to transfer to the statutory representatives a person killed by another's wrongful act the right of action which the injured party might have maintained for his injury had he lived, but those sections give to such statutory representatives, subject to the terms, conditions, and limitations of the statute, a totally new right of action for the wrongful death and that on different principles."

See also Parker v. City of Jacksonville, Fla. 1955, 82 So.2d 131. Cf. Shiver v. Sessions, Fla. 1955, 80 So.2d 905, holding personal defenses against decedent to be inapplicable in an action under the statute, the opinion stating however that the statutory action would be "subject to the defenses of contributory negligence and the like which the tort feasor could have pleaded, in a suit against him by the decedent during his or her lifetime."

[3]Opinion filed May 29, 1968, — So.2d —.

[4]Seaboard Air Line Railroad Company v. Warren G. Williams, Jr., Fla. 1967, 199 So.2d 469.

MASON, Circuit Judge, concurs specially with Opinion.

MASON, Circuit Judge, concurring specially:

After we granted certiorari herein this Court decided the case of Moragne, etc. v. State Marine, Inc., et al., opinion filed May 29, 1968, not yet reported, and I am of the opinion that the principles set forth therein are controlling and decisive of this cause. I, therefore, concur in the majority opinion herein for the sole reason that I believe that we are bound by that decision. Although I believe that **Moragne** was wrongly decided I consider the law therein announced to be binding upon me in the disposition of this case. Uniformity of decision in jurisprudence and jurisdiction, and the basic concept of equal justice under law, require the result reached in the majority opinion herein.

APPENDIX "B"

(TITLE OMITTED)

Opinion filed July 14, 1967.

Appeal from the Circuit Court for Polk County; William K. Love, Judge.

Peter G. Kalogridis, Winter Haven; Robert Orseck of Podhurst & Orseck, and Nichols, Gaither, Beckham, Colson, Spence & Hicks, Miami; and Bill Wagner of Wagner, Cunningham & Vaughan, Tampa, for Appellant.

John W. Boult of Fowler, White, Collins, Gillen, Humkey & Trenam, Tampa, for Appellees.

HOBSON, JUDGE.

Wayne Weed, deceased husband of appellant was injured and subsequently died as the result of a collision between his airboat which he was operating and an airboat owned by the appellees and operated by the appellee James E. Thompson, Jr. The accident occurred on the Kissimmee River, a navigable body of water in Polk County, Florida.

The appellant, plaintiff below, brought two suits against the appellees, defendants below: (1) as administratrix to recover damages for the pain and sufffering of her husband, Wayne Weed, prior to his death, pursuant to Florida Statute 45.11, and (2) for damages for the wrongful death of her husband, pursuant to Florida Statutes 768.01 and 768.02. These causes were consolidated for trial. In the wrongful death action the trial court ruled that the defendants were entitled to assert as a complete defense the contributory negligence of the deceased, Wayne Weed. In the survival action the trial court ruled that the partial defense of comparative negligence was applicable as provided under Admiralty Law.

After appropriate instructions by the trial court as to the complete defense of contributory negligence in the wrongful death action and as to the partial defense of comparative negligence in the survival action the jury returned a verdict for the plaintiff in the survival action and against the plaintiff in the wrongful death action. The appellant has appealed the final judgment entered against her in the wrongful death action.

The sole point on appeal is as follows:

> WHETHER THE TRIAL COURT ERRED IN HOLDING THAT THE ABSOLUTE DEFENSE OF CONTRIBUTORY NEGLIGENCE — RATHER THAN THE PARTIAL ADMIRALTY DEFENSE OF COMPARATIVE NEGLIGENCE — WAS APPLICABLE IN AN ACTION FOR WRONGFUL DEATH BROUGHT UNDER THE FLORIDA WRONGFUL DEATH STATUTE, WHERE THE SUIT WAS PREDICATED UPON A MARITIME TORT COMMITTED ON NAVIGABLE WATERS WITHIN THE STATE OF FLORIDA.

The parties agree and research confirms that there is no reported case wherein any Florida appellate court has determined this point of law.

There is no cause of action for wrongful death arising out of a maritime tort in the absence of an applicable statute. The Death on the High Seas Act, 46 U.S.C.A., Section 761, is not applicable because the accident occurred upon the territorial waters of the State of Florida. The Jones Act, 46 U.S.C.A., Section 688, is not applicable because Wayne Weed was not a seaman.

In The Tungus v. Skovgaard, 358 U.S. 588, 79 S.Ct. 503, 3 L.Ed.2d 524, the Supreme Court of the United States restated the law applicable in the case of the death of a non-seaman on navigable waters within a state.

Tungus held that under such conditions the wrongful death act of the state involved applies and the provisions of such act determine whether or not admiralty principles and maritime law prevail or whether rules of the state applicable to tort law apply.

Therefore, we must turn to the Wrongful Death Statute of the State of Florida, Florida Statute 768.01, to determine the point of law involved in this appeal. Florida Statute 768.01(1) provides:

> "Whenever the death of any person in this state shall be caused by the wrongful act, negligence, carelessness or default of any individual or individuals, or by the wrongful act, negligence, carelessness or default of any corporation, or by the wrongful act, negligence, carelessness, or default, of any agent of any corporation, acting in his capacity of agent of such corporation (*or by the wrongful act, negligence, carelessness or default of any ship, vessel or boat or persons employed thereon*), and the act, negligence, carelessness or default, is such as would, if the death had not ensued, have entitled the party injured thereby to maintain an action (*or to proceed in rem against the said ship, vessel or boat, or in personam against the owners thereof, or those having control of her*) and to recover damages in respect thereof, then and in every such case

> the person or persons who, or the corporation (*or the ship, vessel or boat*), which would have been liable in damages if death had not ensued shall be liable to an action for damages (*or if a ship, vessel or boat, to a libel in rem, and her owners or those responsible for her wrongful act, negligence, carelessness or default, to a libel in personam*), notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony." (emphasis added)

The Florida Wrongful Death Statute was originally enacted in 1883. In 1915 the statute was amended to add those portions underscored above.

In Holley v. The Mansfred Stansfield, 4th Cir. 1959, 269 F.2d 316, the court, in an astute opinion by Chief Judge Sobeloff, held that under the Virginia Wrongful Death Act[1] the admiralty doctrine of comparative negligence applied in the case of a wrongful death on the navigable waters of Virginia. The Virginia wrongful death statute

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[1]Code of Virginia. "Article 3. Death by Wrongful Act. §8-633. Action for death by wrongful act.—Whenever the death of a person shall be caused by the wrongful act, neglect, or default of any person or corporation, or of any ship or vessel, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action, or to proceed in rem against such ship or vessel or in personam against the owners thereof or those having control of her, and to recover damages in respect thereof, then, and in every such case, the person who, or corporation or ship or vessel which, would have been liable, if death had not ensued, shall be liable to an action for damages, or, if a ship or vessel, to a libel in rem, and her owners or those responsible for her acts or defaults or negligence to a libel in personam, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances, as amount in law to a felony. * * *"

is indeed quite similar to that of Florida. In the Holley case, supra, on page 320 the court stated:

> ". . . It is noteworthy that the Virginia statute specifically covers, among other things, 'wrongful acts or defaults of any ship or vessel' and speaks of the right 'to proceed *in rem* against the ship or vessel'—a procedure available only in admiralty. It is too obvious to escape attention that the statute was drafted by one well versed in admiralty law . . . Basically, it provides that if death is caused by an act which would have entitled the injured party to maintain an action, then the person who would have been liable for the injury will continue to be liable notwithstanding the death of the person injured. Undeniably, had Holley survived, the admiralty rule would have governed under which contributory negligence merely reduces the damages."

Our statute, like Virginia's, *preserves all rights which the decedent would have had if his injuries had not proved fatal.* The law is well settled that had Wayne Weed lived the admiralty rule of comparative negligence would have been applicable in an action brought for damages in our state court. Indeed, such rule was correctly applied in the appellant's survival action under Florida Statute §45.11. See Cashell v. Hart, Fla. App. 1962, 143 So.2d 559; Judy v. Belk. Fla. App. 1966, 181 So 2d 694; and Kermarec v. Compagnie General Transatlantique, 358 U.S. 625, 79 S.Ct. 406, 3 L.Ed.2d 550.

Nothwithstanding prior decisions of the United States Court of Appeals for the Fifth Circuit to the contrary, the Supreme Court of Texas in Vassallo v. Nederl-Amerik

Stoomv Maats Holland, Tex. 1961, 344 S.W.2d 421, held that under the Texas wrongful death statute comparative negligence and not contributory negligence was applicable. The Texas statute, unlike Florida's does not mention claims in rem against the vessel or in personam against the owners; it merely preserves rights which the decedent would have had if his injuries had not proved fatal.

The decisions on the point involved herein are too numerous to discuss. However, it is apparent that the weight of authority is that the admiralty substantive law is applicable under wrongful death statutes which preserve the rights that the decedent would *have had if his injuries had not proved fatal.*[2] This is so even though many of the wrongful death statutes do not specifically cover wrongful acts or defaults of any ship or vessel nor speak of the right of action in rem against the ship or vessel or in personam against the owners thereof.

We are not unmindful that the United States Court of Appeals for the Fifth Circuit has held that under the

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[2]These are some of the jurisdictions and supporting citations: *California*: Curry v. Fred Olsen Lines, 367 F.2d 921 (9th Cir. 1966); *Louisiana*: Grigsby v. Coastal Marine Lines, 235 F.Supp. 97 (WD La. 1964); *Maryland*: Maryland ex rel Smith v. A/S Nabella, 176 F.Supp. 668 (DC Md. 1959); Maryland ex rel Gladden v. Weyerhauser S.S. Co., 176 F.Supp. 664 (DC Md. 1959); and Metzger v. S.S. Kirsten Torm, 245 F.Supp. 227 (DC Md. 1956); *New Jersey*: United New York & New Jersey Sandy Hook Pilots Association v. Halecki, 358 U.S. 613, 79 S.Ct. 517, 3 L.Ed. 2d 541 (1959); Petition of Mariana Mercante Nicaraguense, S.D., 248 F.Supp. 15 (SD NY 1965); and The Tungus v. Skovgaard, 358 U.S. 588, 79 S.Ct. 503, 3 L.Ed. 2d 524; *New York*: Cunningham v. Rederiet Vindeggen, A/S, 333 F.2d 308 (2d Cir. 1964); Clark v. Iceland S.S. Co., 6 A.D. 2d 544, 179 N.Y.S. 2d 708, (1st Dept. 1958) and Olsen v. New York Central Railroad Co., 341 F.2d 233, (2d Cir. 1965); *Oregon*: Hess v. United States, 361 U.S. 314, 80 S.Ct. 341, 4 L.Ed. 2d 305 (1960); *South Carolina*: Anthony, Adm. v. International Paper Co., 289 F.2d 574 (4th Cir. 1961); and *West Virginia*: Union Carbide Corp. v. Goett, 278 F.2d 319 (4th Cir. 1960), cert. den. 364 U.S. 824, 81 S.Ct. 64, 5 L.Ed. 2d 55.

Florida Wrongful Death Statute the substantive common law and not that of the general maritime law applies in actions for wrongful death of a non-seaman arising out of an accident occurring upon the navigable territorial waters of the State of Florida. See Graham v. A Lusi Limited, 5th Cir. 1953, 206 F.2d 223 and Emerson v. Holloway Concrete Products Co., 5th Cir. 1960, 282 F.2d 271. It is noted that Judge Brown in the Emerson case, supra, wrote an excellent and well reasoned dissent.

We specifically reject the interpretation placed upon the Florida Wrongful Death Act by the Graham and Emerson cases, supra.

We hold that under the clear and unambiguous wording of the Florida Wrongful Death Statute, Fla. Stat. 768.01, *the admiralty rule of comparative negligence is applicable and preserves to the appellant in this case those rights which the decedent would have had if his injuries had not proved fatal.*

For the reasons set forth above, the final judgment is reversed and the cause remanded for new trial.

SHANNON, A.C.J., and WILLIS, ROBERT E., ASSOCIATE JUDGE, CONCUR.

APPENDIX "C"

(TITLE OMITTED)

Opinion filed May 29, 1968.

Certified Question from the United States Court of Appeals for the Fifth Circuit.

C. J. Hardee, Jr. of Hardee, Ott & Hamilton, for Appellants.

John W. Boult, Dewey R. Villareal, Jr. and Fowler, White, Collins, Gillen, Humkey & Trenam for State Marine Lines, Inc.; David C. G. Kerr, Daniel E. Gallagher and Macfarlane, Ferguson, Allison & Kelly for Gulf Florida Terminal Company, Appellees.

ROBERTS, J.

This cause is before the court for determination of a question of law certified to us by the United States Court of Appeals for the Fifth Circuit pursuant to §25.031, Fla. Stat., and Rule 4.61, Florida Appellate Rules, 31 F.S.A. Moragne v. State Marine Lines, Inc., et al., opinion and certificate filed August 11, 1967. The question certified reads as follows:—

> "Does the Florida Death by Wrongful Act Statute give rise to a cause of action under principles of the maritime law of unseaworthiness for the wrongful death of a longshoreman caused by the unseaworthiness of a vessel on the navigable waters of the State of Florida?"

Plaintiff-appellant's decedent was employed as a longshoreman by Gulf Florida Terminal Company, a stevedore of Tampa, Florida. While performing his regular duties as an employee of this company on board the vessel S. S. Palmetto State, a hatch beam became disengaged from its position, allegedly because of a defective locking arrangement, and fell into the hold striking the deceased in the head, killing him instantly.

Suite was filed by his widow, individually, under the Florida Wrongful Death Act, §768.01, Fla. Stat., and as personal representative of her deceased husband's estate, under the Florida Survival Statutes, §45.11, Fla. Stat., against the defendant-appellee State Marine Lines, Inc., owner of the vessel S. S. Palmetto State, seeking the damages recoverable under these statutes by those entitled thereto. Originally filed in the appropriate state court, the cause was on motion of the defendant removed to the federal court on diversity-of-citizenship grounds.

The plaintiff's complaint was framed in two aspects: one based on the alleged negligence of the defendant-shipowner in failing to keep and maintain the vessel, its equipment and appurtenances, in a safe, sound and proper condition; and another based on the maritime concept of "unseaworthiness." The trial judge dismissed the unseaworthiness count as to the cause of action brought by the plaintiff, individually, under the Florida Wrongful Death Act for the reason that such a cause of action was not within the contemplation of the Wrongful Death Act. Leave to appeal this interlocutory order was granted by the Circuit Court of Appeals, and the question of law quoted above was thereafter certified to this court for decision.

As we understand it, "unseaworthiness" as a basis for liability under maritime law has to do with the absolute nondelegable duty of a shipowner to provide members of the vessel's crew, including longshoremen when engaged in loading, unloading, or stowing the cargo, with a vessel "sufficient in all respects for the trade in which it is employed," Lowe v. Vessel Madrid, D. C. Fla. 1962, 210 F.Supp. 826, and to prevent their injury by any part of the vessel or equipment used in the ordinary course of their employment. Clark v. Symonette Shipyard Ltd., 330 F.2d 554 (C.A. Fla. 1964). It contemplates "liability without fault", Mahnich v. Southern S. S. Co., 321 U. S. 96, 64 S.Ct. 455, 88 L.Ed. 561 (1944), and has been said to be "a duty likened to implied contractual warranty." Seas Shipping Co. v. Sieracki, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099.

It is conceded that, had he lived, the plaintiff's decedent could have filed suit against the defendant-shipowner, in Admiralty, on a cause of action based on unseaworthiness. But this cause of action died with his death under maritime law. Neither the maritime law nor the common law recognized a cause of action for wrongful death. By statute, Congress has provided a remedy for wrongful death on the high seas (the Death on the High Seas Act, enacted in 1920, 46 U.S.C. Sec. 761), and for the death of a seaman (the Jones Act, 46 U.S.C. Sec. 688). But the death of the plaintiff, a non-seaman within the territorial waters of the State of Florida, is not covered by either of these federal statutes. (We note, parenthetically, that even under the Jones Act the plaintiff could not have recovered for the wrongful death of her husband under her cause of action based on unseaworthiness. See Gillespie, Admx. v. United States Steel Corp. 379 U.S. 148, 13 L.Ed. 2d 199 (1964), re-affirming Lindgren v. U. S., 281 U.S. 38, 74 L.Ed. 686, decided in 1930.)

It appears that the plaintiff, as the widow of the decedent, is entitled to the benefits prescribed by the Federal Longshoremen's and Harbor Workers' Compensation Act, Title 33, U.S.C.A., Chapter 18, for the death of her husband; however, any additional remedy to that provided by the federal compensation act must be found, if at all, under the Florida Wrongful Death Act, §768.01, Fla. Stat.

This Act, §768.01, provides as follows:

"(1) Whenever the death of any person in this state shall be caused by the wrongful act, negligence, carelessness or default of any individual or individuals, or by the wrongful act, negligence, carelessness or default of any corporation, or by the wrongful act, negligence, carelessness, or default, of any agent or any corporation, acting in his capacity of agent of such corporation (or by the wrongful act, negligence, carelessness or default of any ship, vessel or boat or persons employed thereon), and the act, negligence, carelessness or default, is such as would, if the death had not ensued, have entitled the party injured thereby to maintain an action (or to proceed in rem against the said ship, vessel or boat, or in personam against the owners thereof, or those having control of her) and to recover damages in respect thereof, then and in every such case the person or persons who, or the corporation (or the ship, vessel or boat), which would have been liable in damages if death had not ensued shall be liable to an action for damages (or if a ship, vessel or boat, to a libel in rem, and her owners

> or those responsible for her wrongful act, negligence, carelessness or default, to a libel in personam), notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony. "(2) The right of action as set forth in subsection (1) above shall extend to and include actions ex contractu and ex delicto."

Since its enactment in 1833, this Act has been treated as restricted in its application to deaths resulting from tortious acts for which the actor would have been liable to the deceased under traditional common-law concepts. See Shiver v. Sessions, 80 So.2d 905 (Fla. 1955), and Shearn v. Orlando Funeral Home, 88 So.2d 591 (Fla. 1956).

It is equally well settled that the Florida Act does not preserve the right of action which the deceased, had he lived, could have prosecuted, but creates in behalf of the statutory beneficiaries a totally new right of action for the wrongful death, on different principles. See Florida East Coast Railway Co. v. McRoberts, 149 So. 631 (Fla. 1933); Shiver v. Sessions, supra, 80 So.2d 905; Parker v. City of Jacksonville, 82 So.2d 131 (Fla. 1955). In the Florida East Coast Railway case the plaintiff sought to recover in a wrongful death action the punitive damages which the decedent, had he lived, could have claimed. In holding that they could not be recovered, this court said:—

> "The common-law right to recover punitive damages having accrued as an incident to the right of the injured party to recover from the tortious injury inflicted in this case, the death of such injured party caused both the right of action and the incidents to it to die at the same time."

It was also pointed out that the language of our Wrongful Death Act, requiring the jury to give such damages "as the party or parties entitled to sue may have sustained by reason of the death of the party killed", clearly implied that punitive damages were to be excluded from consideration in a wrongful death action.

Further illustrating the distinction between the two rights of action—that of the deceased, had he lived, and that of the statutory beneficiaries under the Wrongful Death Act—it was held in each of the other two cases cited above that the statutory beneficiaries could recover the damages sustained by them, even though their decedent's suit, had he lived, would have been barred. Shiver v. Sessions, supra, 80 So.2d 905; Parker v. City of Jacksonville, supra, 82 So.2d 131.

Because of its obligation, in enforcing a state-created right, to "take the right subject to the limitations which have been made a part of its existence . . .", The Harrisburg, 119 U.S. 199, 7 S.Ct. 140, 30 L.Ed. 358 (1886), the Fifth Circuit Court of Appeal held in two cases in accordance with the decisions of this court, supra, that an action for wrongful death based on unseaworthiness was not within the contemplation of the Florida Wrongful Death Act. See Graham v. A. Luci, Ltd., 206 F.2d 223, (C.A. 5, 1953), and Emerson v. Holloway Concrete Products, 282 F.2d 271 (C.A. 5, 1960).

On the appeal in the instant case, and here, the appellant contends that amendments to the Florida Wrongful Death Act made in 1915 and in 1953 have changed its complexion: that, while originally creating and authorizing death actions only when based on a tort against the plaintiff's decedent, the Act has now been broadened to include causes of action arising ex contractu as well as ex delicto.

The appellate court was urged to recede from its decisions in the Graham and Emerson cases, and this court is urged to reject those decisions and align itself with the "great weight of authority" in other jurisdictions and hold that a death action based on unseaworthiness is created by the Florida Wrongful Death Act.

The courts of other jurisdictions, in the decisions here relied on by appellant, appear to us to have made an entirely different interpretation of their wrongful death acts from that made by this court. For example, in Holley v. The Manfred Stansfield, 269 F.2d 317 (C.A. 4th 1959), it was held that the Virginia statute was intended "to preserve rights which the decedent would have had if his injuries had not proved fatal." This interpretation is in direct conflict with the statement of this court concerning the Florida Act in Florida East Coast Railway Co. v. McRoberts, supra, 149 So. 631, that the provisions of the Act

> ". . . do not purport to transfer to the statutory representatives . . . the right of action which the injured party might have maintained for his injury had he lived, but those sections give to such statutory representatives . . . a totally new right of action for the wrongful death, and that on different principles."

Likewise, in Vassallo v. Nederl-Amerik etc., 344 S.W. 2d 421 (Tex. App. 1961), in rejecting the construction of the Texas Wrongful Death Act made by the Fifth Circuit Court of Appeals in Tuelson v. Whitney and Bodden Shipping Co., 10 F.2d 412 (C.A. Tex. 1926), as to the applicability in a death action of the comparative negligence rule recognized in Admiralty, it was said that under the Texas Wrongful Death Act

> ". . . the defendant can assert any defense to that cause of action that it could have asserted if the decedent had survived, and no other. The statutory beneficiaries of a deceased longshoreman have the same substantive rights to recover as the deceased would have had had his injury been less than death. It follows that his contributory negligence must be considered only in mitigation of damages."

This interpretation is contrary to the decisions of this court quoted above; since, as noted, in the Shiver and Parker cases, supra, 80 So.2d 905 and 82 So.2d 131, the defense asserted by the defendant in each of those cases would have been a bar to a suit by the decedent to recover for **his** injuries, but was disallowed in the suit filed by the statutory beneficiaries to recover for **their** injuries; and in the Florida East Coast Railway case, supra, 149 So. 631, it was held that a substantive right of recovery which the decedent would have had (to recover punitive damages) was extinguished with his death along with his right of action, and that, having once died, the express terms of the Act—requiring the jury to award such damages as the **statutory beneficiaries** may have sustained by reason of the death of their decedent—"affirmatively negatives the idea that punitive damages are to be considered as an incident to the damages allowed for the new statutory cause of action." 149 So. at p. 636. And it would seem to be just as inconsistent with the express terms of the Act to allow the damages sustained by the **statutory beneficiaries** by reason of the death of their decedent to be "mitigated"—that is, reduced—in such proportion as the negligence of their decedent contributed to **his** injuries and damage, as it would have been to award punitive damages to the statutory beneficiaries because of the

injuries sustained by their decedent. Yet this would be the result of the holding here contended for by appellant, since the maritime concept of "unseaworthiness" not only holds the ship-owner liable without fault but also allows the seaman or longshoreman to recover even though he is at fault—the so-called comparative negligence rule of the maritime law. As noted above, such a result would appear to be "affirmatively negatived" by our Wrongful Death Act, as in the Florida East Coast Railway case, supra, 149 So. at page 636.

We are not, therefore, persuaded by the decisions cited by the appellant, since they appear to be bottomed on statutes entirely different—or, at least, interpreted differently—from the Florida Wrongful Death Act. On the other hand, the appellee calls our attention to decisions based on death statutes interpreted as creating "a new right of action" and holding that the substantive law of the state, rather than concepts peculiar to maritime law such as "unseaworthiness" and the comparative negligence rule, was applicable in a wrongful death action. See Lee v. Pure Oil Co., 218 F.2d 711 (C.A. 6, 1955); Curtis v. Garcia y Cia, 241 F.2d 30 (C.A. 3, 1957); and Niepert v. Cleveland Electric Illuminating Co., 241 F.2d 916 (C.A. 6, 1957), cert. den. 354 U.S. 909, 77 S.Ct. 1295 (1957). These decisions are in accord with the interpretation of the Florida Wrongful Death Act made by this court in the decisions cited above, and many others.

Nor are we persuaded that the 1915 and 1953 amendments to the Florida Wrongful Death Act had the effect of creating a right of action for death caused by unseaworthiness, as contended by the appellant.

The 1915 amendatory Act, Ch. 6913, Laws of Florida, Acts of 1915, was entitled "AN ACT to amend Sec. 3145, General Statutes of the State of Florida, [Sec. 768.01(1), Fla. Stat.] relating to claims for death caused by negligence." (Emphasis added.) It added to the statute the clauses appearing in parentheses in the Act, Sec. 768.01(1), quoted above. The parentheses were a part of the Act, as amended. The purpose of the Legislature in parenthesizing these additions to the Act is not apparent; perhaps, it was simply to make clear that the Act contemplated a cause of action for death even though predicated on circumstances giving rise to a tort cognizable in Admiralty as well as under the substantive law of this state. In any event, we cannot assume that the Legislature intended, in 1915, to extend the Wrongful Death Act to include a right of action based on a concept purely maritime in character, unknown to the common law and the substantive law of this state, contrary to the decisions of this court interpreting the Act, and not within the intendment of the Act, as expressed in the title of the amendatory Act, as one creating a cause of action "for death caused by negligence." If this had been intended, it would have been a simple matter to add appropriate words at the end of the list of derelictions recited in the Act, and to so indicate in the title of the amendatory Act. It did not do so, and still has not done so, unless that result was achieved by the 1953 amendment to the Act, as here contended by the appellant.

The 1953 amendment, Ch. 28280, Laws of Florida, Acts of 1953, added Subsection (2) of the Act, to provide that

> "(2) The right of action as set forth in subsection (1) above shall extend to and include actions ex contractu and ex delicto."

It was adopted subsequent to the decision of this court in Whitley v. Webb City, Inc., 55 So.2d 730 (Fla. 1951), presumably to encompass a death action based on a cause of action for breach of implied warranty without fault recognized by this court in a limited area. See Sencer v. Carl's Market, Inc., 45 So.2d 671 (Fla. 1950); Foley v. Weaver Drugs, Inc., 177 So.2d 221 (Fla. 1965), and cases cited therein. The appellant makes the ingenious argument that a cause of action for "unseaworthiness" is a specie of "liability without fault", in the nature of an "implied contractual warranty", and, as such, is within the contemplation of the 1953 amendment, supra.

We think no useful purpose would be served in entering into a discussion of the "strick liability" theory under which this court has in a few situations—mostly involving foodstuffs—held a manufacturer or retailer to be strictly liable for injuries resulting from use of a product without regard to established common-law principles relating to implied warranty. It suffices to say that the maritime concept of "unseaworthiness" is completely foreign to the "implied warranty" concept of strict liability with which the Legislature was obviously concerned in enacting the 1953 amendment. Moreover, to hold that "unseaworthiness" is contemplated by the Act, as amended in 1953, we would have to assume that the Legislature intended to grant to one small segment of our population (the surviving dependents of a deceased longshoreman or seaman killed in the course of his employment) the special privileges which the maritime law would have accorded, not to them, but to their decedent, and to deny an equal advantage to others similarly situated in all respects except as to the occupation of their decedent. In the absence of a clear legislative mandate, we cannot infer such a dis-

criminatory int ntion on the part of the Legislature, even if it be assumed, arguendo, that such an intention could be validly accomplished. Cf. Georgia Southern & Florida Railway Co. v. Seven-Up Bottling Co. of Southeast Georgia, 175 So.2d 39 (Fla. 1965).

Finally, we note that the Legislature lost no time in amending the Wrongful Death Act following the decision of this court in the Whitley case, supra, 55 So.2d 730 (it was amended at the next succeeding session of the Legislature), yet more than fifteen years have elapsed since the Fifth Circuit Court of Appeals held in the Graham case, supra, 206 F.2d 223, that the Act was not applicable to a death action based on the maritime tort of "unseaworthiness," and it has been more than eight years since this holding was re-affirmed in the Emerson case, supra, 282 F.2d 271. The Legislature has not seen fit to act in response to such decisions.

In all of these circumstances, it is our opinion that to hold that "unseaworthiness" is within the contemplation of our Wrongful Death Act would be tantamount to judicial legislation; and this, of course, is beyond our constitutional power.

The decision of a Florida District Court of Appeal in Weed v. Bilbrey, 201 So.2d 771, referred to by appellant, has been noted; however, this decision is pending before this court on direct-conflict certiorari and is not, therefore, either final, authoritative or decisive of the certified question.

For the reasons stated, the answer to the question certified must be in the negative.

CALDWELL, C. J. and THOMAS, J., concur.

WHITE, Circuit Judge (Retired), concurs with Opinion.

ERVIN, J., dissents with Opinion.

WHITE, JOS. S., Circuit Judge (Retired), concurring:

Liability for "unseaworthiness" as applied by the Federal Courts seems even broader than liability for breach of implied warranty. While the duty arising in case of unseaworthiness has been compared, by way of illustration, with the duty created by implied warranty, yet the Supreme Court of the United States, at the same time, has said: "It (liability for unseaworthiness) is essentially a species of liability without fault, analogous to other well known instances in our laws. Deriving from and shaped to meet the hazards which performing the service imposes, the liability is **neither limited by conceptions of negligence nor contractual in character.**" See Seas Shipping Co. v. Sieracki, supra. (Emphasis added)

This concept takes the case beyond the purview of Florida's Wrongful Death Statute.

Hence, I concur in the opinion prepared by Mr. Justice Roberts.

ERVIN, J., dissenting:

I am unable to agree with the foregoing opinion insofar as it holds that Florida's Death by Wrongful Act statute (Section 768.01, F.S.) does not incorporate the general maritime law concept of "unseaworthiness" of a vessel.

I agree with the reasoning supplied by Judge Brown in his able dissent in Emerson v. Holloway Concrete Products Company (5th Cir. 1960), 282 F.2d 271, 285, to the effect that the specific reference to admiralty proceedings contained in the Florida statute reflects a commanding purpose to "extend to survivors whatever benefit the substantive maritime law would have afforded for maritime injuries."

Prior to 1953, I acknowledge that some doubt could have been raised in opposition to the view that Florida's statute incorporated substantive maritime concepts; or at least some speculation could have been proffered as to the extent of any such incorporation. Thus, before 1953 the enumeration of the terms "wrongful act," "negligence," "carelessness," or "default" may have provided some support for the proposition that the statute only extended to embrace liability concepts sounding in the characteristics suggested by those specific terms; that is, liability predicated on duties responsive to the fault or negligence culpability of the defendant. Accordingly, until 1953 it might have been argued with some force that the purposeful scope of the statute necessarily excluded the maritime doctrine of "unseaworthiness" and other principles which predicate liability on implied warranty theory or which are founded on expanding concepts of "strict liability." It is obvious, however, that whatever notion may have existed prior to 1953 concerning the limited nature of substantive concepts of liability under the statute [see Whitley v. Webb City, Inc. (Fla. 1951), 55 So.2d 730] such was clearly expunged by the amendment (Ch. 28,280) in 1953 by the Florida Legislature which provided for actions thereunder ex contractu or ex delicto. Under the amendatory clarification as to the intended scope of substantive liability embraced by the statute, this Court has incurred

little difficulty in predicating wrongful death recovery on the theory of "implied warranty." See Green v. American Tobacco Co. (Fla. 1963), 154 So.2d 169. In light of these developments, it can no longer be logically asserted that our Wrongful Death Statute is strictly a "Lord Campbell's Act," and thereby exclusive of those substantive liability concepts foreign to the common law at the time of its enactment.

In Seas Shipping Co. v. Sieracki, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099, seaworthiness was said to be a "duty likened to implied contractual warranty." In Strike v. Netherlands Ministry of Traffic, 185 F.2d 55 (2d Cir. 1950), cert. den. 341 U.S. 904 (1950), it was defined as "a relationship giving rise to an implied warranty as between the owner and seaman." Viewed, therefore, in accordance with the crystallized scope of our statute pertaining to the substantive law on which recovery thereunder may be achieved, I am convinced that the statute contemplates the incorporation of the maritime concept of seaworthiness. See Weed v. Bilbrey (Fla.App. 1967), 201 So.2d 771, holding that the statute embraces the maritime doctrine of comparative negligence. By holding otherwise, I feel the majority has unduly restricted the intent embraced by the 1953 amendment to the statute and has placed in doubt, if not departed from, the existing law relating to recovery for death predicated on implied warranties of fitness and suitability or other strict liability concepts. See Toombs v. Ft. Pierce Gas Co. (Fla. 1968), 208 So.2d 615, for example of the expanding development of nonmaritime liability concepts as potential grounds for predicating wrongful death benefits.

SUPREME COURT, U. S.

APR 18 1969

JOHN F. DAVIS, CLERK

No. 1109

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

EDNA WEED,
Petitioner,

vs.

OWEN BILBREY, SR., GLADYS BILBREY, OWEN BILBREY, JR., PHYLLIS BILBREY, JAMES E. THOMPSON, JR., and PAULA THOMPSON, d/b/a OWEN BILBREY FRUIT COMPANY and JAMES E. THOMPSON, JR., Individually,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENTS IN OPPOSITION

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No. 1109

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

EDNA WEED,
Petitioner,

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OWEN BILBREY, SR., GLADYS BILBREY, OWEN BILBREY, JR., PHYLLIS BILBREY, JAMES E. THOMPSON, JR., and PAULA THOMPSON, d/b/a OWEN BILBREY FRUIT COMPANY and JAMES E. THOMPSON, JR., Individually,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Supreme Court of Florida (Pet. App. 1-3)[1] is reported at 215 So.2d 479 (Fla. 1968). The preceding opinion of The Second District Court of Appeal of Florida in the same cause (Pet. App. 5-11) is reported at 201 So.2d 771 (Fla. DCA 2d, 1967).

1. "(Pet. App.)" refers to the Appendix to the Petitioner's Petition for a Writ of Certiorari filed in this cause.

JURISDICTION

This litigation began when Petitioner filed a Complaint for damages against Respondents in the Circuit Court for Polk County, Florida. (Pet. App. 5). In its pertinent aspect, the damage suit was brought pursuant to the terms and provisions of the Florida Wrongful Death Act, Florida Statutes, §§ 768.01, 768.02; and the Complaint alleged that the death of the Petitioner's decedent resulted from the Respondents' negligent operation of an air boat and a consequent collision on the Kissimmee River in Polk County, Florida. (Pet. App. 5).

The trial Court (Circuit Court for Polk County, Florida) ruled that the defendants in that cause (Respondents here) were entitled to assert the decedent's contributory negligence as a complete defense. (Pet. App. 5). The jury returned a verdict in favor of the Respondents in the Wrongful Death Act suit. (Pet. App. 6).

Petitioner appealed to the Second District Court of Appeal of Florida on the question of whether, under the provisions of the Florida Wrongful Death Act, admiralty principles prevail or "whether rules of the state applicable to tort law apply." (Pet. App. 7). The Second District Court of Appeal of Florida thereupon undertook to determine this "point of law" under the express terms of the Florida Wrongful Death Act (Pet. App. 7); and interpreted and construed the Florida Statute to mean that the maritime doctrine of comparative negligence, and not the traditional defense of contributory negligence, should be applied if the fatal accident occurs on navigable water in Florida. The District Court reasoned that the conceptual effect of the Florida Wrongful Death Act was to "preserve" to the enumerated statutory beneficiaries of that Act all rights which their decedent would have had had he lived. (Pet. App. 9). (Pet. App. 11). The judgment of

the trial court was accordingly reversed by the Second District Court of Appeal. (Pet. App. 11).

The Respondents thereafter filed a Petition for Writ of Certiorari in the Supreme Court of Florida seeking review of the decision of the Second District Court of Appeal. (Pet. App. 1). A Writ of Certiorari was granted by the Supreme Court of Florida (Pet. App. 1); and, upon consideration on the merits, the Florida Supreme Court held that the intermediate appellate court had misconstrued and misinterpreted the Florida Wrongful Death Act. (Pet. App. 1-2). The Supreme Court of Florida held and stated that the Florida Wrongful Death Act did not have the conceptual effect of "preserving" to the statutory beneficiaries all the identical rights of their decedent, but, instead that the act "creates" an entirely new right of action "on different principles". (Pet. App. 1, 2). The Florida Supreme Court thus held that the Florida Wrongful Death Act does not embrace the maritime principle of comparative negligence. (Pet. App. 1-2).

The present Petition for a Writ of Certiorari seeks review of that decision of the Supreme Court of Florida. The Respondents submit, and we will argue in the "Argument" portion of this brief, that the Petitioner has demonstrated no predicate for the assumption of jurisdiction by this Honorable Court in this cause since the decision of the Florida Supreme Court herein, and the decision of the intermediate appellate court which preceded it, are each addressed to a narrow question of interpretation of a state statute. This question is purely local in character and harbors no "federal question" either expressly or impliedly. Neither decision discusses or even mentions the federal questions raised here by the Petitioner in the "Questions Presented" portion of the Petition.

QUESTIONS PRESENTED

The Petitioner states, as the questions presented, the following (Petition, page 4):

> I) Does Article III, Section 2 of the Constitution of the United States, or federally developed maritime principles, require uniform application of substantive admiralty principles by the states to actions for wrongful death brought under State Wrongful Death Acts, arising out of maritime torts committed on state navigable waters?
>
> II) Does application of substantive state common law tort principles, foreign to federally enunciated maritime doctrines, by the courts of a state under such a state statute, unfairly discriminate against statutory beneficiaries in violation of the Fourteenth Amendment?
>
> III) Does application of substantive state common law tort principles, by the Courts of a state under such a State statute, contravene the provision of Article VI of the Constitution of the United States, which renders the Constitution and laws of the United States made in pursuance thereof the supreme law of the land?

We respectfully observe at this juncture that the Petitioner did not raise, present or even mention these questions at any appropriate stage of the proceedings in the Courts of the State of Florida. These questions were raised by Petitioner for the first time *after* the filing of the decision of the Florida Supreme Court sought to be reviewed here. (Petition, page 10). These questions were therefore not considered by the Supreme Court of Florida or the Florida intermediate appellate Court.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutory and constitutional provisions deemed to be involved by Petitioner (Fla. Stat. § 768.01; U.S. Const., Art. III, § 9; U.S. Const., Amend. XIV, § 1; U.S. Const., Art. VI) are set forth in the Petition at pp. 5-6.

STATEMENT OF THE CASE

The underlying facts are adequately set forth in the Petition at pp. 7-11. In addition, the Respondents respectfully refer the Court to the matters recited herein under the heading of "Jurisdiction".

ARGUMENT

Under this heading we will set forth the reasons for denying the writ in this cause. The fundamental basis of the Respondents' contention is that the decision sought to be reviewed is addressed to the narrow question of the construction of a statute enacted by the Florida legislature. The decision is entirely local and non-federal in content and substance, and emerges solely from the performance by the Florida Supreme Court of its duty judicially to construe the statutes of the State of Florida. This was the basis upon which the Petitioner approached the problem throughout the proceedings in the State Courts. Only after the Florida Supreme Court interpreted the statute in a manner unfavorable to Petitioner did Petitioner attempt to inject federal constitutional considerations into the litigation. Further, even had there been the proper and timely injection of an alleged "federal claim" by Petitioner, we submit that this proceeding harbored no "federal question" whatever in that the decision of the Florida Supreme Court constitutes a proper performance by that Court of its duty and prerogative to define and declare the law of the State of

Florida, including particularly the duty and power to define and declare the scope and dimensions of a cause of action created by the legislature of the State of Florida. We will show further that the decision sought to be reviewed contravenes no overriding federal constitutional requirement. We will argue these matters under separate subheadings below.

I. The Petitioner Did Not Raise Any Federal Question in the State Court Proceedings.

As Petitioner concedes (Petition, page 10), the Petitioner did not raise any federal constitutional question in the State Court proceedings until after the filing of the decision of the Florida Supreme Court. It is clear on the face of both the opinion of the Florida Supreme Court and the intermediate court of appeal that Petitioner considered the question presented to those courts as nothing more than a question of the interpretation of a Florida Statute. In this regard, Petitioner's course of action following the adverse judgment in the trial court is revealing. At that juncture the case was in precisely the same posture it is now. That is to say, the trial judge had ruled that contributory negligence of Petitioner's decedent was a complete bar to recovery under Florida principles and not a partial bar under maritime principles. The Petitioner took an appeal to the Second District Court of Appeal of Florida, an intermediate appellate court. Had such appeal involved a controlling provision of the United States Constitution, as is now asserted by Petitioner, such appeal would have been required to be taken directly to the Supreme Court of Florida. See, Fla. Const., Art. 5, §§ 4(2) and 5(3).

Furthermore, the issue presented to the Second District Court of Appeal by Petitioner (Appellant then), as stated by that Court (Pet. App. 7) was purely an issue involving the interpretation of the express language of a local

statute. (Pet. App. 7, 11). The decision of the intermediate appellate court does not undertake to decide, in any way whatever, any question involving the provisions of the United States Constitution. The same is true of the ensuing decision of the Supreme Court of Florida (Pet. App. 1-3) sought to be reviewed here. The Florida Supreme Court decision addresses itself exclusively to the questions of (1) the interpretation of a Florida Statute, (2) the problem of ascribing to it its intended conceptual effect and meaning, and (3) the task of defining for Florida litigants the scope and contents of rights, remedies, and burdens accorded to persons bringing, or defending, lawsuits predicated solely upon the provisions of the Florida Wrongful Death Act.

In these circumstances we respectfully submit that the Petitioner wholly failed to preserve "federal questions" to serve as a proper basis for review by this Honorable Court.

The Petitioner (Petition, page 2) grounds jurisdiction assertedly on the provisions of 28 U.S.C. 1257(3). This provision authorizes Certiorari review by this Court of decisions of the highest court of a state:

> ". . . where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States. . . ."

But in the exercise of this jurisdiction, this Court has emphasized repeatedly that the alleged federal question must be presented to or decided by the state court. Thus, in *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U.S. 430, 434, 60 S.Ct. 670, 672-673, 84 L.Ed. 849 (1940), this Court said:

> "In cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to re-

> frain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review. Apart from the reluctance with which every court should proceed to set aside legislation as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there. It is for these reasons that this Court, where the constitutionality of a statute has been upheld in the state court, consistently refuses to consider any grounds of attack not raised or decided in that court."

With particular regard to the decision of a state court which simply construes a state statute in a manner thereafter alleged to be repugnant to federal law this Court said in *Louisville & N. R. Co.* v. *Louisville*, 166 U.S. 709, 715-716, 17 S.Ct. 725, 41 L.Ed. 1173 (1897):

> "The agreed case presented no issue as to the validity of the statute, but simply the question of its construction. . . . It is now said that as the proper construction of the statute was definitely settled by the court of appeals, this court can take jurisdiction at that stage of the case, because as thus construed the statute impaired the obligation of a contract . . . and because it denied the equal protection of the laws in contravention of the 14th Amendment, although no definite issue in either respect was tendered throughout the proceedings unless the mention of the Constitution of the United States on the motion to set aside may be so regarded. We do not think that was sufficient."

Moreover, the attempted raising of a federal question for the first time in a petition for rehearing addressed to the highest state court is insufficient unless that court actually entertains the petition and expressly decides the question. See, *Radio Station WOW* v. *Johnson*, 326 U.S. 120, 65 S.Ct. 1475, 89 L.Ed. 2092 (1945); *Herndon* v. *Georgia*, 295 U.S. 441, 55 S.Ct. 794, 79 L.Ed. 1530 (1935). And a

waiver of federal question results when the litigant, as did Petitioner herein, fails to follow state appellate procedure providing for direct review of the federal question by the state supreme court but seeks review instead in the intermediate appellate tribunal. See, *Central Union Tel. Co.* v. *Edwardsville,* 269 U.S. 190, 46 S.Ct. 90, 70 L.Ed. 229 (1925).

In sum, we respectfully submit that the Petitioner not only failed to bring a federal claim to the attention of the state courts with fair precision, but failed to do so at all. Accordingly, we submit that the present Petition is procedurally ill-founded and should be denied.

II. The Central Question of Law Considered by the Three Florida State Courts Below Was Purely Local and Non-Federal in Character and Cannot Serve As a Basis for Jurisdiction Here.

Under this subheading it is assumed for the purposes of argument only that the purported federal grounds asserted here as a basis for granting the writ were properly preserved below. Even with this assumption we respectfully submit that the proceedings in the state courts were attended by no potential federal questions whatever. Instead, as Petitioner's attitude in the state courts bespeaks, the questions arising from the litigation were, by clear definition derived from decisions of this Court, purely local questions of state law. The litigation began in the Circuit Court for Polk County, Florida, as a statutory suit for civil damages pursuant to the provisions of the Florida Wrongful Death Act, Fla. Stat., § 768.01. The cause of action sought to be enforced was created by the Florida legislature. In the trial court the question arose as to whether the statute contemplated recovery of money by Petitioner in the event the jury determined that Petitioner's decedent negligently contributed to his own death. The trial court and the Florida Supreme Court

construed the legislative intent to be that there should be no recovery under the statute in the event of such negligence on the part of Petitioner's decedent. It is difficult to conceive of a more uniquely local and non-federal legal question. And the two appellate decisions rendered herein (Pet. App. 1-11) show on their face that the result was reached solely upon consideration and determination of an adequate and independent non-federal legal question.

This Court has consistently and emphatically adhered to the self-imposed principle that it will *not* review a state court judgment based upon an adequate and independent non-federal ground. See, *Murdock* v. *Memphis*, 87 U.S. (20 Wall.) 429, 444 (1875); *Berea College* v. *Kentucky*, 211 U.S. 45, 29 S.Ct. 33, 53 L.Ed. 81 (1908); *Fox Film Corp.* v. *Muller*, 296 U.S. 207, 56 S.Ct. 183, 80 L.Ed. 158 (1935).

Moreover, Petitioner's effort to convert the "non-federal" basis of the state court judgment into a "federal ground" must clearly fail. Until now Petitioner has never claimed assertion of a federal claim. Until now Petitioner has acknowledged that the wrongful death action being pursued was a non-federal cause of action created by the State of Florida and governed in its definition and scope by the laws of the State of Florida as declared by the courts of Florida. And it was entirely meet and proper that the Petitioner so acquiesce in such a "choice-of-law" principle since that is the principle recognized and approved by this Court for application in Wrongful Death Act Suits arising from fatal accidents on navigable water within the territorial waters of a state. The often cited decision of this Court in *The "Tungus"* v. *Skovgaard*, 358 U.S. 588, 79 S.Ct. 503, 506, 3 L.Ed.2d 524 (1959), restated and buttressed this choice of law principle which had been

emphatically announced as early as 1886. Thus, in *The Harrisburg*, 119 U.S. 199, 7 S.Ct. 140, 30 L.Ed. 358 (1886), this Court said (119 U.S. 214):

> "[I]f the admiralty adopts the (State Wrongful Death) statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence. . . ."

Of course, we note Petitioner's present contentions (1) that *Tungus* should now be overruled and replaced by the idea that the various state wrongful death acts should be used simply to fill the void in the federal legislative pattern; (2) that the Courts in the judicial administration of these acts (including state courts administering their own acts) should disregard the state-imposed limitations upon which their enactment was conditioned; and (3) that federal maritime principles should be imported into these acts even though they be contrary to the express or judicially ascertained intent of the enacting legislature. We submit that the pronouncements of this Court in *Tungus* and *Harrisburg* regarding choice-of-law were not so ill-conceived as to be dismissed so casually. It is worthy of note that the choice-of-law principle stated by this Court in *Tungus* has, according to our research, been followed no less than 35 times by this Court, federal district and circuit courts. Rather than enumerating these decisions in the body of this brief we have listed these decisions chronologically in the "Glossary" at the end of the brief. Thus, the holding of *Tungus* that the state law governs these suits has become firmly embedded as precedent. We submit that such emphatic precedent cannot be lightly regarded or thoughtlessly abolished. We are not unaware that some courts have chaffed at the *Tungus* rule and have even predicted its

change in the interest of uniformity. However the case under consideration involved amphibious airboats designed to operate on calm, inland waters. We submit the circumstances are maritime but local in nature and we submit that the maritime incidents to the accident herein are miniscule in comparison to the basic and fundamental local character of the occurrence. Moreover, the *Tungus* choice-of-law principle is eminently sound.

The enactment of state wrongful death acts has been attended by a variety of limitations and conditions. In the absence of these limitations and conditions the statutes presumably would never have been enacted at all. And in administering these acts in the courts these limitations and conditions surely must be acknowledged and applied according to the considered views of the state courts charged with the responsibility of shaping the laws of the states and construing their statutes.

Accordingly, the contributory negligence vis-a-vis comparative negligence question was properly presented to the Florida Supreme Court as a question governed by the substantive law of Florida. That is to say, the question was presented as one to be decided by the Florida Court on the basis of that Court's view as to the applicable *state* law. The question decided by the Florida Court was, therefore, purely local and non-federal. The opinion therefore furnishes no basis for jurisdiction here.

III. The Decision Sought to Be Reviewed Contravenes No Federal Constitutional Requirements.

Again, we assume for purposes of argument only that federal constitutional considerations were properly raised below by Petitioner. Even so assuming we submit that the decision of the Florida Supreme Court contravenes no federal constitutional requirements. We note that Petitioner cites no decision supporting the contention that any provi-

sion of the United States Constitution has been violated. Petitioner simply "cites" from the United States Constitution: Article III, Section 2 (the judicial article extending jurisdiction to United States Courts to "cases of admiralty and maritime jurisdiction"); Amendment XIV, Section 1 (the "equal protection" clause); and Article VI (the supremacy clause).

We respectfully submit that reliance upon these provisions in this case is wholly misplaced.

For example, this was plainly not a "case of admiralty jurisdiction" since the suit was founded exclusively on the provisions of a state statute, arose in circumstances wherein the federal maritime law furnishes no right or remedy whatever, and is one in which plaintiff did not even attempt to use the admiralty jurisdiction, electing rather to proceed, by jury trial, in state court.

Secondly, Petitioner's reliance upon the "equal protection" clause suggests that the Florida Wrongful Death Act, as construed, accords to Petitioner protection less generous than the maritime law. But the Florida Wrongful Death Act afforded Petitioner protection infinitely more generous since the federal maritime law affords none at all.

This brings us to the final observation regarding the "supremacy clause." Here there are simply no "laws of the United States" which might be said to override the state laws applied here. As *Tungus* points out (79 S.Ct. at 507) the United States Congress has studiously sought to preserve state sovereignty over death actions arising within the territorial waters of the states. Here Petitioner simply sought the benefits of an enactment of the Florida legislature. Petitioner received precisely the same treatment as would any other claimant under that Act. We submit that Petitioner cannot predicate a valid constitutional ob-

jection upon the fact that the Florida courts refused to extend to Petitioner rights larger than those afforded the vast majority of claimants under the Act.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief for Respondents in Opposition of Petition for Writ of Certiorari to the Supreme Court of Florida was mailed to William Wagner, Esquire, Wagner, Cunningham and Vaughan, 412 Pierce Street, Tampa, Florida, Peter G. Kalogridis and Podhurst & Orseck, 2nd Floor, Concord Building, Miami, Florida, Attorneys for Petitioner, this 11th day of April, 1969, and to the Clerk of the Supreme Court of Florida.

By: William A. Gillen

GLOSSARY

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Goett v. *Union Carbide Corp.*, 361 U.S. 340, 342, 343, 80 S.Ct. 357, 358, 359, 4 L.Ed.2d 341 (1960).

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SUPREME COURT, U. S.

FILED
MAY 29 1969
JOHN F. DAVIS, CLERK

IN THE UNITED STATES SUPREME COURT

October Term 1968

No. 1109

EDNA WEED,
Petitioner,
vs.
OWEN BILBREY, SR., GLADYS BILBREY,
OWEN BILBREY, JR., PHYLLIS BILBREY,
JAMES E. THOMPSON, JR., and
PAULA THOMPSON, d/b/a
OWEN BILBREY FRUIT COMPANY and
JAMES E. THOMPSON, JR., Individually,
Respondents.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

FREDERICK WILLIAM WAGNER
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I

STATEMENT OF THE CASE

This Court, by order dated May 5, 1969, denied the Petition herein for a Writ of Certiorari to the Supreme Court of Florida. Three Justices, Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Brennen, were of the opinion that certiorari should have been granted. The underlying issue was whether the Florida Courts were bound to apply maritime law to a wrongful death case occurring on Florida navigable waters when such action was brought pursuant to the Florida Wrongful Death Statute. The contention of the petitioner, of course, was that the Florida Courts were bound by the Federal Constitution or Federal Maritime Law to apply comparative negligence to the case. The Florida Supreme Court had ruled that Florida tort principles of contributory negligence as opposed to comparative negligence were applicable.

For the reason that intervening circumstances have occurred in the cause, which the petitioner believes are of substantial effect here, the petitioner makes this petition for rehearing.

II

INTERVENING CIRCUMSTANCES OF SUBSTANTIAL EFFECT AS GROUNDS FOR PETITION FOR REHEARING

On August 11, 1967, in the case of *Moragne, et al. v. State Marine Lines, Inc.*, 5 Cir. 1967 (case No. 24198), the United States Court of Appeals for the Fifth Circuit certified to the Florida Supreme Court, under Florida Appellate Procedure, the question as to whether the Florida Death Statute gave rise to an action based on unseaworthiness where a long-

shoreman had been killed on Florida navigable waters. The Florida Supreme Court answered in the negative on May 29, 1968, Fla. 1968, 211 So. 2d 161, (rehearing denied July 3, 1968). A copy of the opinion of the Florida Supreme Court answering the certified question was annexed to the original petition for certiorari herein as appendix C.

At the time the petition herein was filed, the counsel for the plaintiff in the *Moragne* case had filed an application in the United States Court of Appeals for the Fifth Circuit to disregard the answer of the Florida Supreme Court to the certified question, arguing that the Constitution or Federal Law required application of admiralty principles to wrongful death cases arising out of incidents on Florida navigable waters. The Fifth Circuit accepted briefs and oral arguments on the question and had that issue and application under advisement when the petition herein was filed.

On April 1, 1969, the Fifth Circuit in the said *Moragne* case denied the application of the plaintiff longshoreman in the *Moragne* case to disregard the answer of the Florida Supreme Court. The Court held that it was up to the Courts of the State of Florida to determine whether the Florida State Wrongful Death Act encompassed the admiralty concept of unseaworthiness.

The counsel for the longshoreman in *Moragne* has now filed a petition for a writ of certiorari to the United States Supreme Court from the decision of the Fifth Circuit which affirmed the striking of unseaworthiness from a wrongful death complaint under the circumstances above described. That petition is now pending before the United States Supreme Court. The basic federal questions in *Moragne* and in this case are the same. If the petition in *Moragne* is granted and if the United States Supreme Court assumes jurisdiction in *Moragne*, and determines that the Florida Courts are duty bound by the

Federal Constitution and/or by Federal Maritime Law to apply admiralty principles such as unseaworthiness, then in the same vein the Florida Court would be duty bound to apply the doctrine of comparative negligence rather than the Florida state tort doctrine of contributory negligence in this case. In short, should this Court rule in favor of the petitioner-plaintiff in *Moragne*, that ruling would govern the law applicable to petitioner in this case as well. The petition in *Moragne* is now pending in this Court and petitioner here respectfully suggests that this is an intervening circumstance which occurred subsequent to the filing of the petition for certiorari in the within case and indeed occurred subsequent to the denial of certiorari in this case.

Since the decision of this Court in *Moragne* will directly bear upon the issue which was presented to this Court in the instant case, the petitioner herein respectfully requests that a rehearing be granted so that this matter can be considered along with the petition in *Moragne*. We feel this is important so that the essentially identical rights of the parties can consistently be determined rather than potentially inconsistently determined by reason of the fortuitous circumstance of the timing of the petitions to this Court.

Finally, as of May 5, 1969, it appears that the membership of the Court will be changed with the resignation of Mr. Justice Fortas.

Public announcements from Washington have also indicated that Mr. Chief Justice Warren will retire from the Bench around June 16, 1969. *Moragne* cannot be considered by this Court before that date and probably not for some reasonable time thereafter due to the summer adjournment of the Court.

The closeness of the question presented here is attested to by the fact that three Justices were of the opinion that the

original petition in this case should have been granted. In the apparent controlling authority, *Tungus v. Skovgaard*, 1959, 358 U. S. 588, 79 S. Ct., 503, 3 L. Ed. 2d 524, this Court was closely divided (five to four) on this same issue. A new Justice, of course, will replace Mr. Justice Fortas and Mr. Chief Justice Warren. This means that membership of the Court will be changed by at least one Justice and probably two Justices before *Moragne* is determined by this Court. On an issue of such importance as this, where the Court was divided to begin with, it is respectfully requested that the matter be reconsidered with the new Justice or Justices being given the opportunity to consider it and to present his or their views to the rest of the Court. Mr. Justice Fortas and Mr. Chief Justice Warren, of course, were with the majority which denied the petition herein. The circumstance of the resignation of Mr. Justice Fortas and the imminent retirement of Mr. Chief Justice Warren, it is respectfully submitted, is an intervening circumstance of substantial effect.

III

CONCLUSION

It is respectfully requested that the petition for rehearing herein be granted and, in the interest of consistency in the law, that the order denying the petition for certiorari be reconsid-

ered, along with the recently filed petition in *Moragne*. The petitioner believes that she has demonstrated intervening circumstances of substantial effect herein.

Respectfully submitted,

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By /s/
Frederick William Wagner

IV

CERTIFICATE OF GOOD FAITH PURSUANT TO RULE 58

The undersigned counsel, on behalf of the petitioner herein, certifies to this Honorable Court that the petition for rehearing is presented in good faith and not for delay and the petition is restricted to grounds of intervening circumstances of substantial effect. The petitioner certifies that the petition for rehearing is restricted solely to such grounds.

Respectfully submitted,

/s/.....

Frederick William Wagner

V

CERTIFICATE OF SERVICE

WE DO HEREBY CERTIFY that three true copies of the foregoing Petition for Rehearing of Order Denying Petition For Writ of Certiorari and Certificate of Good Faith Pursuant to Rule 58 was mailed this 28 day of May, 1969 to Mr. William A. Gillen of Fowler, White, Collins, Gillen, Humkey & Trenam, Box 1438, Tampa, Florida, attorneys for Respondents.

/s/.....

Frederick William Wagner